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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-532

CHESTER McKINNEY, *Petitioner,*

versus

STATE OF ALABAMA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC. AND MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE*

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Interest of the *Amici Curiae*

The Association of American Publishers, Inc. ("AAP") is a trade association organized under the laws of the State of New York. It is composed of publishers of general books, textbooks and educational materials. Its more than 260 members, which include many university presses and religious book publishers, publish in the aggregate the vast majority of all general, educational and religious books produced in the United States. These works are distributed in thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities throughout the United States.

The International Periodical Distributors Association, Inc. ("IPDA") is the trade association for the twelve

principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers for ultimate distribution to retailers and the public throughout the United States.

The Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and/or distributors of motion pictures in the United States.

The members of AAP, IPDA and MPAA are directly and significantly affected by the decisions of this Court in cases on the form and substance of obscenity regulation and by the ensuing legislative, judicial and prosecutorial actions which flow from these decisions.

As more states turn to interdependent civil-criminal regulatory systems [1] rather than strictly criminal systems, the decision of this Court on the Alabama statute [2] now before it will have a determinative influence on the structure of such legislative efforts. As such, the AAP, IPDA and MPAA have a direct interest in this case for it will shape the law in Alabama, where all do business,[3] and throughout the country where other states are and will be considering the same and similar kinds of legislation.

All three of the *amici* have in one form or another expressed their preference that if there is to be

[1] The terms "interdependent civil-criminal regulatory systems" or "prior civil procedures" refer to the class of statutes that provide a civil determination on the issue of obscenity before criminal liability may attach.

[2] Code of Ala., Tit. 14, ch. 64A, §§ 374(1)-374(16).

[3] Although the Alabama statute does not now cover motion pictures, its application could be extended to include motion pictures at any time by an amendment to the law by the State Legislature.

any regulation of obscenity, it proceed by civil rather than criminal action. *Amici,* however, oppose the civil procedure in the Alabama statute, in that the protections it affords are outweighed by its usurpation of fundamental due process rights.

This brief, then, is filed as a friend of the Court with the intention of assisting the Court in distinguishing between the particular problems of the statute before it and the particular advantages of prior civil procedures generally.

Although AAP, IPDA and MPAA represent commercial interests, to the best knowledge ascertainable from the record, none of the *amici* have any financial interest in the challenged materials in this case.

The *amici* requested and received permission from counsel of record for both parties to file this Brief *amici.*[4]

Preliminary Statement

This Brief is filed by *amici* in support of petitioner's contention that the Alabama statute[5] is unconstitutional on its face and as applied. Our support is expressly limited to the statute's denial of due process as alleged under the

[4] Copies of the letters giving permission are being filed with the Clerk of this Court simultaneously with the filing of this Brief.

[5] Code of Ala., Tit. 14, ch. 64A, § 374(4).

second question[6] in the Petition for a Writ of Certiorari. Notwithstanding this constitutional infirmity of the Alabama statute, the *amici* argue that a properly drafted prior civil procedure law could incorporate procedural safeguards consistent with the requirements of due process.

This case is an appeal from a conviction under the criminal provisions of an interdependent civil-criminal statute of the State of Alabama. Code of Ala., Tit. 14, 64A, §§ 374(1)-374(16) (hereafter referred to by section number only). This statute provides that a judgment that challenged materials are obscene made in a prior civil proceeding need not be reproven in subsequent criminal prosecutions of persons given notice of judgment. The question here is whether the statute on its face and as applied denies petitioner, a non-party to the civil action, his due process right to be heard.

Statement of Facts

§ 374(5) provides that a solicitor for any judicial circuit may institute a civil action when he has reason to

[6] Petition for Writ of Certiorari to the Supreme Court of Alabama, p. 3 reads:

> "2. Whether the trial and conviction of the Petitioner under Title 14, Section 374, Code of Alabama, without determination of the obscenity *vel non* of the materials as a material element of the offense violated the First, Fifth, Sixth, and Fourteenth Amendments, because:
>
> (a) The Petitioner was deprived of his right to a fair trial and due process of law because a material element of the offense, obscenity, was not tried and proved, that element being 'incorporated' by a prior civil determination of obscenity to which the Petitioner was not a party;
>
> (b) The Petitioner was deprived of his right to a fair trial and due process of law because [the] statute denied him the right of confrontation."

believe that allegedly obscene material is or is about to be brought into the state or sold in Alabama. Pursuant to this authority, the District Attorney of the 13th Judicial District of Alabama commenced an action against certain magazines, naming as respondents person or persons not named in the record, but admittedly not including the petitioner.

On February 26, 1970, the magazines were declared obscene and on March 10, 1970, petitioner was served with notice of that judgment. The petitioner continued selling the proscribed magazines and on March 21, 1970, he was charged, pursuant to § 374(4), with selling a magazine judicially declared obscene. At his trial and at subsequent appeals of his conviction through the Alabama Supreme Court, the petitioner was denied the opportunity to challenge the prior determination of obscenity. "The only issue of fact for [the jury] to decide involved the question of selling material judicially declared to be obscene as charged in the complaint." *McKinney* v. *State,* 292 Ala. 484, 296 So.2d 228, 230 (1974).

The crucial fact here is that petitioner was neither a named party to the civil action nor given timely notice of its pendency and the right to intervene.[7] As such, at no time in the civil or criminal proceedings was the petitioner granted the opportunity under this statute to present evi-

[7] The court is not here confronted and need not decide the issue of whether a State could properly use a determination of obscenity in a prior civil proceeding in a subsequent criminal action against a person who was a party to both actions. Nor need it decide to what purpose, *i.e.* proof of obscenity, proof of scienter, that use must be limited as against the same party. For a discussion of the *res judicata*-collateral estoppel issues this would pose, see the discussion of *U.S.* v. *Carlisi,* 32 F.Supp. 479 (E.D.N.Y. 1940), *U.S.* v. *DeAngelo,* 138 F.2d 466 (3rd Cir. 1943) and *Helms* v. *State,* 35 Ala. App. 187, 45 So.2d 170 (1950) in *McKinney* v. *State,* 292 Ala. 484, 296 So.2d 228, 234 (1974) (Heflin, *C.J.* dissenting).

dence or confront or cross-examine witnesses on the issue of obscenity, the "basis of this (criminal) prosecution." Respondent's Brief and Argument in Opposition to Petition for Writ of Certiorari, page 9.

Summary of Argument

1. This court has expressed its preference for prior civil determinations, which give advance notice of what is proscribed, over bald criminal statutes in state systems of obscenity regulation. *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973); *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957).

2. The Alabama statute presented here incorporates the notice advantage of a prior civil determination. At the same time, however, it effectively circumvents the State's criminal laws and their appended procedural safeguards. *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963). As such the statute fails constitutionally by denying non-parties to the prior civil action, the petitioner here, the essential element of due process, the opportunity to be heard. *Mullane* v. *Central Hanover Bank,* 339 U.S. 306 (1950); *Goss* v. *Lopez,* 419 U.S. 565 (1975).

3. In contrast to the Alabama statute, recently enacted statutes in North Carolina [8] and North Dakota [9] provide the same notice, but also procedural safeguards required by due process of law.

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[8] N. Car. Gen. Stats., 14-190.1–14-190.11 (1974 Supp.).

[9] N. Dak. Century Code, 12.1-27.1-01, 12.1-27.1-5–12.1-27.1-12 (1975 Supp.).

ARGUMENT

I

A prior civil procedure is the preferred means of obscenity regulation.

This Court has long held that obscenity is not subject to the blanket protections of the First Amendment. *Roth* v. *United States,* 354 U.S. 476 (1957); *Kois* v. *Wisconsin,* 408 U.S. 229 (1972) (*per curiam*); *Miller* v. *California,* 413 U.S. 15 (1973). At the same time it is equally mindful that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant,* 367 U.S. 717, 731 (1961). In circumscribing state regulatory efforts, an issue of continuing concern to this Court is that state obscenity laws provide fair notice of what is proscribed, both as a matter of criminal law, *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939); *United States* v. *Harriss,* 347 U.S. 612 (1954) and to prevent self-censorship intrusions on protected speech. *Smith* v. *California,* 361 U.S. 147 (1959); *Rabe* v. *Washington,* 405 U.S. 313 (1972) (*per curiam*); *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676 (1968).

It it is settled law that civil procedures are within the "legislature's [constitutionally permissible] range of choice" in regulating obscenity. *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 441 (1957). In fact, this court previously endorsed the prior civil approach as the preferred means to provide notice under state regulatory systems. *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973).

Cognizant of the "*in terrorem* effect" of criminal sanctions, *Kingsley Books, Inc.* v. *Brown, supra* at 442, this

Court approved a Georgia prior civil procedure insulating disseminators from the risk of prosecution without notice of what is proscribed. In its landmark decision, *Paris Adult Theatre I* v. *Slaton, supra,* Chief Justice Burger, speaking for the majority noted,

> "... such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Id.* at 55.

This Court has not yet confronted the direct question of whether such a procedure is constitutionally mandated. At least one member of the Court, cognizant of what Justice Brennan described as the "inherent vagueness of any definition of obscenity", *Paris Adult Theatre I* v. *Slaton, supra* at 89 (Brennan, *J.*, dissenting), is of the opinion "that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained." *Miller* v. *California,* 413 U.S. 15, 41 (1973) (Douglas, *J.*, dissenting). Although the weight of dicta supports making prior civil determinations mandatory, until it is so held, this much is clear: There is agreement in this Court that a prior civil procedure is to be preferred over a bald criminal statute in determining what is or is not subject to First Amendment protection.

II

The Alabama law is unconstitutional in failing to provide petitioner an opportunity to be heard.

The focus of the attack on the Alabama statute is that while it does provide the preferred notice advantage of a prior civil determination, its specific procedures fail to comply with the requirements of due process.

In approving a New York civil procedure law regulating obscenity, this Court did not limit its inquiry to the notice question. *Kingsley Books, Inc.* v. *Brown, supra.* Of equal import was its insistence that the procedures in the New York law comply with due process requirements. Speaking to this point, the Court said:

> "The method devised by New York in Section 22-a [now CPLR § 6330], for determining whether a publication is obscene does not differ in essential procedural safeguards from that provided under many state statutes making the distribution of obscene publications a misdemeanor." *Id.* at 443.

The teaching of this case is that if a state elects to use the preferred approach of a prior civil procedure, it must do so in a manner consistent with this Court's "insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards," *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963), for even "a desirable end cannot be promoted by prohibited means." *Meyer* v. *Nebraska,* 262 U.S. 390, 401 (1923).

The Alabama statute stands in bold contrast to the standard set out in *Kingsley* and *Bantam.* Here, the notice advantages of the prior civil approach become mere units of barter, protections gained in exchange for due process protections lost. Under its provisions, the petitioner is denied due process safeguards that would be available to him in a criminal prosecution if the state could not truncate that process by the operation of this civil-criminal procedure.

This is not the first time this Court has been confronted with a statute enabling a State to circumvent its own

criminal laws. The vice complained of here is in substance the same vice faced by the court in *Bantam.*[10]

> "Herein lies the vice of the system. The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process." *Bantam Books, Inc.* v. *Sullivan, supra* at 69-70.

If the State of Alabama could not rely on this statute, before it could obtain a conviction of the petitioner under traditional criminal laws, it would have had to prove each element of the crime charged, *Piano* v. *State,* 161 Ala. 88, 49 So. 803 (1909), including the obscenity of the materials, and afforded petitioner the opportunity to confront and cross-examine the witnesses and evidence against him. *Pointer* v. *Texas,* 380 U.S. 400 (1965). As such, the Alabama system imposes the same denial of due process this Court found unsupportable in *Bantam.*

In fact, there is a distinction between the situation in *Bantam* and the instant case which poses even more serious doubts as to the viability of the Alabama system. In

[10] In *Bantam,* the agency of the State was a non-judicial body, whereas in this case, it is a court of civil jurisdiction. That distinction, standing alone, cannot save it. The simple phrase judicial "is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 441 (1957). "The Fourteenth Amendment as now applied to the states protects the citizen against the State and all its creatures." *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1943).

Bantam, the result was accomplished solely through the practices of the commission. If a party before that commission was willing to "stand his ground . . . confident . . . the book could not be condemned as obscene", *Kingsley Books, Inc.* v. *Brown, supra* at 443, nothing in the Rhode Island statute in *Bantam* denied that party a full criminal trial with all the procedural safeguards that entails. In the instant case, however, the analogous *Bantam* practices are built into the Alabama statutory scheme itself. Whereas in *Bantam* only the practices were declared unconstitutional, here the entire statute is at stake.

" 'The fundamental requisite of due process of law is the opportunity to be heard,' . . . a right that 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether . . . to contest.' " *Goss* v. *Lopez,* 419 U.S. 565, 579 (1975) (citations omitted). In the civil proceeding under the Alabama statute, where the obscenity issue was litigated, the petitioner was not named as a respondent and not given the opportunity to be heard.

Although § 374(6)(c) purports to require the State's Attorney to name as respondents, among others, ". . . any person in this State preparing, selling, exhibiting or commercially distributing [obscene materials]", and the petitioner met that statutory definition, the statute did not in fact compel the State's Attorney to name the petitioner as respondent.[11] From the State's perspective, in that notice of judgment is sufficient to bind the petitioner to the prior civil determination, the statute provides no incen-

[11] It is illuminating to note that the petitioner, who fits the statutory definition was excluded from the list of those named as respondents. Yet, less than two weeks after the judgment, the previously unknown petitioner suddenly became known to the District Attorney for the purpose of serving the notice of judgment which triggers criminal liability.

tive for diligent efforts to insure that all interested parties are named as respondents and given the opportunity to be heard.[12]

In the criminal proceeding under this statute it is conceded that petitioner both did not and could not litigate the obscenity issue.

Even though petitioner's "rights are to be affected [and he is] entitled to be heard," *Baldwin* v. *Hale*, 68 U.S. (1 Wall.) 223 (1864), the interdependent civil and criminal provisions of this statute, viewed together, neither on their face guarantee nor in application provide the petitioner the opportunity to be heard on the crucial issue of obscenity. As such, the statute on its face and as applied denies petitioner due process of law and is unconstitutional.

III

Statutes of other States, incorporating the prior civil approach, include procedures required by due process of law.

The *amici* contend that the specific procedures utilized in the Alabama statute violate standards of due process of law. They argue, however, that the specific procedural deficiencies can be remedied by a statute that limits application of the prior civil determination to those given notice of the pendency of the civil action and the opportunity to be heard.

[12] If instead, the civil determination was binding only on those named as respondents and those given notice of the pendency of the action and the right to intervene, the State would have the requisite incentive to serve all appropriate parties. Such a system, involving mandatory prior service of the complaint rather than subsequent service of notice of judgment imposes no greater administrative burden. In each case, one service must be made, the difference being that subsequent service negates the opportunity to be heard.

This court has noted that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). Whether a particular statute meets this standard cannot be decided in the abstract, but rather must "await [the States'] concrete legislative efforts." *Miller* v. *California*, 413 U.S. 15, 25 (1973). As such, the decision in this case should be limited to the facts and the particular statute.

A number of States have recently considered legislation incorporating a prior civil procedure[13] and two States, North Carolina[14] and North Dakota,[15] have enacted laws embodying this approach. In both States, however, the newly-enacted statutes include procedural safeguards not found in the Alabama statute challenged here.

The argument of the *amici* presented here focused on two deficiencies in the Alabama statute. First, the statute authorized the use of the determination in the prior civil proceeding in the subsequent criminal prosecution of petitioner, a non-party to the civil action. Second, it enabled the State to preclude the petitioner from raising the issue of obscenity at the criminal trial. It is the view of the *amici* that a prior civil procedure law need not contain such procedures and that the new North Carolina and North Dakota laws resolve these problems in a manner consistent with the requirements of due process.

[13] For example, California Senate Bill 886 (1975-75 Regular Session) is now before the State Assembly, having passed the State Senate. That bill limits subsequent criminal prosecutions to parties to the prior civil proceeding.

[14] N. Car. Gen. Stats., 14-190.1–14.190.11.

[15] N. Dak. Century Code, 12.1-27.1-01, 12.1-27.1-05–12.1-27.1-12.

N. Car. Gen. Stats. §§ 14-190.2(a)[16] and (h)[17] (hereafter referred to by section numbers only) limit criminal prosecution for subsequent disseminations to respondents in the prior civil proceeding. In order to minimize the necessity of duplicitous civil actions, §§ 14-190.2(i)[18] and (k)[19] empower the State to bind third parties by giving them notice of the filing of the complaint and the opportunity to intervene. Only respondents and those deemed to be respondents are subject to subsequent criminal prosecution under

[16] § 14-190.2(a) reads:

> "The purpose of this section is to provide an adversary determination of the question of whether books, magazines, motion pictures, or other materials are obscene prior to their seizure or prior to a criminal prosecution relating to such materials."

[17] § 14-190.2(h) reads:

> "No person, firm or corporation shall be arrested or indicted for any violation of a provision of G.S. 14-190.1, G.S. 14-190.3, G.S. 14-190.4, G.S. 14-190.5, G.S. 14-190.6, G.S. 14-190.7, G.S. 14-190.8, . . . until the material involved has first been the subject of an adversary determination under the provisions of this section, wherein such person, firm or corporation is a respondent, and wherein such material has been declared by the court to be obscene . . . and until such person, firm or corporation continues, subsequent to such determination, to engage in the conduct prohibited by a provision of the sections hereinabove set forth."

[18] § 14-190.2(i) reads:

> "Any person, firm or corporation which is given written notice by registered mail of the filing of the complaint and of the judgment of the court as provided for in this section shall be *deemed a respondent* and shall be bound by the judgment of the court." (Emphasis added.)

[19] § 14-190.2(k) reads:

> "Any person, firm or corporation which is disseminating or which may disseminate the material challenged in the civil proceeding provided for in this section may intervene in said proceeding as a matter of right. Said intervenor shall have all the rights of a respondent and shall be bound by the judgment."

the North Carolina statute. As distinguished from the Alabama statute, under the North Carolina law it is persons with notice of the pendency of the action and the opportunity to be heard who come within the purview of the criminal provisions of the statute.

Again, unlike the Alabama statute, the use to which the prior civil determination may be used is carefully circumscribed under the North Carolina statute. § 14-190.2(f) reads in part,

> ". . . in any criminal action, charging violation of any other section of the Article, against any person, firm or corporation that was a respondent in such civil hearing, and involving the same material declared to be obscene under the provisions of this section, then evidence of such hearing shall be *competent and admissible as bearing on the issue of scienter only.*" (Emphasis added.)

To the extent the North Carolina statute embodies sensitive responses to the due process questions inevitably posed by statutes incorporating prior civil procedures, that statute lends weight to the argument that the Alabama statute is not only deficient, but unnecessarily deficient, in that remedies to the due process problems can and do exist.

CONCLUSION

For the reasons set forth above, the *amici curiae* respectfully submit that the judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

BARBARA SCOTT
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Certificate of Service

I hereby certify that I have served three copies of this Brief of The Association of American Publishers, Inc., The International Periodical Distributors Association, Inc., and The Motion Picture Association of America, Inc. as *Amici Curiae* upon counsel of record for each of the parties by depositing copies of said Brief in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery by air mail.

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